

)	
R.A., Appellant)	
)	
and)	Docket No. 19-1595
)	Issued: August 13, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Garfield, NJ, Employer)	
)	

James D. Muirhead, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 22, 2019 appellant, through counsel, filed a timely appeal from an April 9, 2019 merit decision² of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that OWCP issued a June 27, 2019 nonmerit decision which is within the Board's jurisdiction. However, counsel did not file an appeal from that decision, thus the Board will not address that decision in this appeal.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability commencing August 31, 2012, causally related to his accepted February 1, 2000 employment injury.

FACTUAL HISTORY

On February 1, 2000 appellant, then a 49-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date, he broke his left hand when he fell on ice near steps while in the performance of duty. He stopped work on the date of injury. On March 3, 2000 OWCP accepted the claim for fracture of the left hand carpal bone. Appellant underwent a surgical fusion of the left hand on March 1, 2000. He returned to a limited-duty position on August 2, 2000, stopped work on August 15, 2000, and returned to part-time, limited employment duties of four hours per day, effective March 6, 2006. The limited-duty position noted that all work duties would be performed with the right hand, as appellant was unable to use the left hand for repetitive movements. OWCP paid him wage-loss compensation on the supplemental rolls based upon his loss of wage-earning capacity as of March 6, 2006, and on the periodic rolls as of September 30, 2007.

On October 11, 2007 appellant accepted a part-time modified job offer for three hours of work per day. The physical requirements of the position required writing and lifting less than five pounds, using the left arm to hold less than one pound of mail, sorting mail with the right hand, using both arms to hand mail weighing less than five pounds to customers, and picking up a telephone with both hands.

On February 27, 2008 OWCP expanded acceptance of the claim to include the additional condition of complex regional pain syndrome (CRPS), left upper extremity.

In a narrative report dated August 31, 2012, Dr. Frederick Fakharzadeh, a Board-certified orthopedic surgeon, noted appellant's history of injury. He examined appellant and found that he had greater complaints of pain at the medial left elbow; numbness in the "long, ring, and little fingers" of his left hand, with milder numbness in the index finger and satisfactory sensation in the thumb; numbness of the dorsal ulnar left hand and ulnar border of the left hand; satisfactory thenar sensation; good perfusion; a left wrist infused with previous unrelated surgery; a positive Tinel's sign over the ulnar nerve at the left elbow; a Tinel's sign over the left side of his neck with radiation to this fingers; a negative Tinel's sign at the wrist and forearm over the ulnar nerve;

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that OWCP received additional evidence following the June 27, 2019 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

weakness of finger abduction; profundus of the left “little finger”; and weakness of grip and intrinsic muscle function. Dr. Fakharzadeh opined that appellant “appears to have some worsening.” He recommended electromyography and nerve conduction velocity (EMG/NCV) studies to distinguish “if this is an ulnar neuropathy, which was documented as a work injury in 2000 when he fell at work and injured the left upper extremity.” Dr. Fakharzadeh opined that appellant was “disabled from his work altogether without ability to return to his previously significantly limited capacity. The worsened weakness I think precludes his ability to return to work. Further treatment will depend on his electrodiagnostic studies.”

In an August 31, 2012 attending physician’s report (Form CA-20), Dr. Fakharzadeh, noted that on February 1, 2000 appellant fell on an icy sidewalk. He indicated that appellant had a preexisting fused left wrist and diagnosed ulnar neuropathy of the left elbow and left cervical radiculopathy. Dr. Fakharzadeh checked the box marked “Yes” indicating that appellant’s current conditions were caused or aggravated by an employment activity. He further noted that the conditions were “caused by a fall onto left arm at work February 1, 2000.”

OWCP also received a progress report from Dr. Fakharzadeh dated September 6, 2013, wherein he reiterated his opinion that appellant had worsening numbness in the left hand, which was probably related to ulnar neuropathy. He opined that appellant was unable to work and should be on total disability and again recommended electrodiagnostic studies in each of his reports.

In a September 6, 2013 Form CA-20 report, Dr. Fakharzadeh noted that on February 1, 2000 appellant fell on an icy sidewalk at work and injured his left upper extremity. He indicated that appellant had a preexisting fused left wrist and diagnosed ulnar neuropathy of the left elbow and possible cervical radiculopathy. Dr. Fakharzadeh checked the box marked “Yes” indicating that appellant’s current conditions were caused or aggravated by an employment activity. He further noted that the conditions were “caused by a fall onto left arm at work February 1, 2000.” Dr. Fakharzadeh opined that appellant was permanently and totally disabled from August 31, 2012. He again recommended electrodiagnostic studies.

In a narrative report dated September 9, 2014, Dr. Fakharzadeh noted that appellant had continuing complaints of numbness in the left long, right and little fingers, and milder complaints in the thumb and index fingers. He also noted appellant’s physical examination findings and concluded that he had ulnar neuropathy, which had significantly worsened and caused significant weakness. Dr. Fakharzadeh again recommended electrodiagnostic studies and indicated that appellant was unable to work.

In a September 9, 2014 Form CA-20, Dr. Fakharzadeh noted that on February 1, 2000 appellant fell on icy steps while working and that he had a prior fusion of the left wrist for an unrelated injury. He diagnosed “left ulnar neuropathy, likely elbow, possibly cervical.” Dr. Fakharzadeh checked the box marked “Yes” indicating that appellant’s current conditions were caused or aggravated by an employment activity. He further noted that the conditions were “caused by a fall onto left arm at work February 1, 2000.” Dr. Fakharzadeh opined that appellant was permanently and totally disabled from work commencing August 31, 2012. He again recommended electrodiagnostic studies.

On September 9, 2014 Dr. Fakharzadeh also completed a work capacity evaluation form (OWCP-5c) in which he noted that appellant had permanent work restrictions due to pain and weakness of the left upper extremity.

On September 18, 2015 Dr. Fakharzadeh noted appellant's history of injury and physical examination findings. He concluded that appellant had apparent neuropathy with worsening numbness in the right hand,⁵ which had worsened since his employment injury. Dr. Fakharzadeh reported that appellant had notable weakness, which was probably ulnar neuropathy primarily, but may be other neuropathy as well. He again concluded that appellant was unable to work.

In a September 6, 2016 report, Dr. Fakharzadeh examined appellant and found numbness and weakness in the left hand with an apparent neuropathy. He opined that the condition was caused by compression of the ulnar nerve, but could have a different origin. Dr. Fakharzadeh advised that appellant was unable to work and repeated his request for electrodiagnostic studies.

On April 3, 2017 OWCP received an undated notice of recurrence of disability (Form CA-2a) alleging a recurrence of disability since September 1, 2012. Appellant explained that he had been receiving wage-loss compensation for five hours of disability per day, but that he was totally disabled from work and Dr. Fakharzadeh had determined that his hand condition had worsened and required further diagnostic testing.

In a September 1, 2017 report, Dr. Fakharzadeh noted that he initially treated appellant on September 8, 2001, for left hand pain following a February 1, 2000 injury when he fractured his left wrist at work after slipping on ice and falling down steps. He advised that appellant continued to have long-standing difficulty grasping and holding things with continued pain and numbness in the left hand and up the arm. Dr. Fakharzadeh indicated that appellant had a prior fusion of the left wrist for an unrelated injury and a previous documented ulnar neuropathy on EMG scan following the nerve surgery. He noted that appellant had retired from the employing establishment, but continued to have complaints of numbness diffusely in the left hand and ulnar wrist pain. Dr. Fakharzadeh examined appellant and found numbness and weakness of the left hand with neuropathy. He opined that this condition was due to compression of the ulnar nerve and that appellant was unable to work.

On June 18, 2018 appellant filed a notice of recurrence (Form CA-2a), claiming time lost from work effective August 31, 2012, based on a material change in his accepted work-related condition. He argued that his left hand and wrist gradually worsened and he was totally disabled from work. Appellant indicated that he was only working three hours per day and stopped work altogether on November 30, 2008. The employing establishment controverted the claim and noted that appellant had retired in 2008.

In a development letter dated August 2, 2018, OWCP informed appellant of the deficiencies in his recurrence claim and informed him of the type of evidence necessary to establish his claim. It noted that appellant's accepted conditions were open fracture of the left carpal bone and reflex sympathetic disorder (RSD) of the upper limb. OWCP requested that appellant provide

⁵ This appears to be a typographical error as the Board notes that the remainder of Dr. Fakharzadeh's reports reference a left hand injury.

a rationalized medical report explaining the basis of his claimed recurrence and provided a questionnaire for him to complete. It afforded appellant 30 days to respond. On August 14, 2018 OWCP received his response to the development questionnaire. Appellant noted that he continued to experience pain, and his left hand condition had worsened.

By decision dated September 4, 2018, OWCP denied appellant's claim for compensation commencing August 31, 2012, finding that the medical evidence of record was insufficient to establish how the accepted condition had worsened effective August 31, 2012.

On September 10, 2018 appellant, through counsel, requested a telephonic hearing, which was held on February 8, 2019. Appellant indicated that he was then receiving compensation for five hours per day and was seeking compensation for the additional three hours per day due to his recurrent disability.

In an October 7, 2018 report, Dr. Fakharzadeh noted appellant's history of injury and treatment. He examined appellant and provided findings of significant ulnar neuropathy. Dr. Fakharzadeh explained that the initiating factor was trauma to the left elbow, that appellant had surgery in 2001, and had continued worsening of his ulnar nerve function over time. He noted that he recommended electrodiagnostic studies repeatedly over several prior years, but they were yet to be performed. Dr. Fakharzadeh opined that he was "not altogether certain as to the origin currently, but it is in the distal ulnar compartment of the wrist." He advised that the degree of weakness and loss of muscle function in the left hand limited appellant's ability to do manual work and he had been out of work since 2008. Dr. Fakharzadeh again recommended electrodiagnostic studies to assess the ulnar nerve function and distinguish any other possible origins, such as cervical radiculopathy.

By decision dated April 9, 2019, OWCP's hearing representative affirmed the September 4, 2018 decision finding that the medical evidence of record was insufficient to establish that appellant experienced a change in the nature and extent of his accepted condition on or around August 31, 2012.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁶ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁷

⁶ 20 C.F.R. § 10.5(x); *see T.J.*, Docket No. 18-0831 (issued March 23, 2020); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁷ *Id.*

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁸

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.⁹ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing August 31, 2012, causally related to his accepted February 1, 2000 employment injury.

In Form CA-20 reports dated August 31, 2012, September 6, 2013, and September 9, 2014, Dr. Fakharzadeh diagnosed ulnar neuropathy of the left elbow and left cervical radiculopathy and checked the box marked "Yes" indicating that appellant's current conditions were caused or aggravated by an employment activity. He also indicated that appellant was permanently and totally disabled from August 31, 2012. The Board has held that to establish a period of disability the medical evidence must provide a discussion of how objective medical findings, attributable to the accepted conditions, support a finding that a claimant could not perform his or her job duties.¹¹ As such, these reports are insufficient to discharge appellant's burden of proof with respect his recurrence of disability claim.

Dr. Fakharzadeh also completed an OWCP-5c form report in which he noted that appellant had pain and weakness of the left upper extremity which caused permanent work restrictions. While he noted findings on examination, and described symptoms, he did not provide an opinion as to the cause of appellant's disability from work. The Board has held that medical evidence that does not provide an opinion as to whether a period of disability is due to an accepted employment

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

⁹ *J.D.*, *supra* note 6; *C.C.*, Docket No. 18-0719 (issued November 9, 2018).

¹⁰ *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

¹¹ *See S.G.*, Docket No. 18-0209 (issued October 4, 2018); *R.A.*, Docket No. 17-1472 (issued December 6, 2017); *Sedi L. Graham*, 57 ECAB 494 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

condition is insufficient to meet a claimant's burden of proof.¹² Therefore this report is insufficient to establish appellant's recurrence of disability claim.

In separate narrative reports dated August 31, 2012, September 6, 2013, September 9, 2014, and September 18, 2015, Dr. Fakharzadeh opined that appellant "appears to have some worsening" in his hand, but did not address a period of disability. As noted, a medical report lacking an opinion as to whether a period of disability is due to an accepted condition lacks probative value.¹³ Therefore, these reports are also insufficient to establish the claimed recurrence of disability.

In his reports dated September 6, 2016, September 1, 2017, and October 7, 2018, Dr. Fakharzadeh opined that appellant's condition was caused by compression of the ulnar nerve, but could have a different origin. He explained that he was "not altogether certain as to the origin currently, but it is in the distal ulnar compartment of the wrist." Dr. Fakharzadeh continued to advise in this report that appellant was unable to work. The Board notes, however, that OWCP as only accepted a fracture of the left hand and RSD/CRPS of the left upper extremity. These reports fail to provide an opinion as to whether the recurrence of disability was due to the accepted conditions and therefore lacks probative value.¹⁴

As appellant has not submitted sufficient medical evidence to establish that he was disabled from work beginning August 31, 2012 and continuing, due to a spontaneous change or worsening of his accepted February 1, 2000 employment-related conditions of left hand carpal fracture and left upper extremity RSD/CRPS, the Board finds that he has not met his burden of proof to establish his claim.¹⁵

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing August 31, 2012, causally related to his accepted February 1, 2000 employment injury.

¹² *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See J.P.*, Docket No. 18-1396 (issued January 23, 2020).

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board